INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	4
Argument	6
Conclusion	8

CITATIONS

Statutes and Regulations:	
The Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. 41 *et seq.*, Section 10, 15 U.S.C. 50	3
The Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 181, *et seq.*:	
Section 312(a), 7 U.S.C. 213(a)	2, 6
Section 401, 7 U.S.C. 221	2, 6
Section 402, 7 U.S.C. 222	3, 6
Department of Agriculture Regulations promulgated under the Packers and Stockyards Act:	
9 C.F.R. 201.55	4
9 C.F.R. 201.71	4

676098—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 755

JOSEPH L. MITCHELL, D/B/A LA SALLE COUNTY LIVESTOCK MARKETING CENTER, PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1-3)[1] is reported at 308 F. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1962 (Pet. App. 4). The petition for a writ of certiorari was filed on January 18, 1963.

---

[1] "Pet. App." refers to the appendix to the petition for certiorari filed in this Court. "Pet." refers to that petition. "P.A." refers to the printed appendix attached to petitioner's brief in the court of appeals.

The jurisdiction of this Court is invoked under 7 U.S.C. 194(h) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the findings of the Judicial Officer of the Department of Agriculture were supported by substantial evidence.

2. Whether the hearing examiner erred in admitting evidence relating to certain tests involving the loss of weight by livestock through hauling.

STATUTES AND REGULATIONS INVOLVED

1. The Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.*, provides in pertinent part:

> SEC. 312. [7 U.S.C. 213(a)](a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.
>
> * * * * *
>
> SEC. 401. [7 U.S.C. 221] Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, * * * Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business,

the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept * * *.

SEC. 402. [7 U.S.C. 222] For the efficient execution of the provisions of this Act, * * * the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act * * *.

The Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. 41 *et seq.*, provides in pertinent part:

SEC. 10. [15 U.S.C. 50] * * * Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made * * * or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum * * * or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, * * * shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

* * * * * *

2. Department of Agriculture Regulations promulgated under the Packers and Stockyards Act, provide in pertinent part:

9 C.F.R. 201.55

> When livestock or live poultry is bought or sold on a weight basis in transactions subject to the provisions of the act, settlement therefor shall be on the basis of the weight shown on the scale ticket or correction ticket, as the case may be. Any weight figures shown on accounts of sale, accounts of purchase, invoices, bills, or statements issued in connection with transactions subject to the act shall be actual weights obtained on stockyard scales, in the case of livestock, or on scales operated by licensees, in the case of live poultry, at the place and at the time of the consummation of the transactions in question or, if not, shall be appropriately explained on the accountings, bills, or statements issued.

9 C.F.R. 201.71

> Each stockyard owner, market agency, or licensee who weighs livestock at a posted stockyard or live poultry in a designated area shall install, maintain, and operate the scales used for such weighing so as to insure accurate weights.

STATEMENT

Petitioner seeks review of a decision of the court of appeals upholding a determination by the Judicial Officer of the Department of Agriculture that petitioner violated the Packers and Stockyards Act by falsely weighing cattle at his stockyard. Petitioner does business as the La Salle County Livestock Mar-

keting Center, a stockyard regulated under the Act. As such, he was registered with the Secretary of Agriculture both as a "market agency" and as a "dealer." (P.A. 1.)

At a lengthy hearing before a hearing examiner, evidence was introduced that on October 12, 1960, twenty head of cattle were weighed by petitioner and sold by him to purchasers acting for the Department of Agriculture. The cattle were then transported eleven miles by truck, were weighed 42 minutes after the first weighing, and were 835 pounds lighter than at the first weighing (P.A. 165). On October 13, 1960, another twenty head of cattle were weighed and sold by petitioner to the same purchasers. They were similarly transported and weighed some forty minutes later by officials of the Department of Agriculture, and were 780 pounds lighter than at the first weighing (P.A. 165). In both instances petitioner stamped the incorrect heavier weights on the stockyard weight tickets (P.A. 78–79). On each occasion prior to the reweighing by a qualified official of the Department of Agriculture, the scales to be used were tested and found to be accurate (P.A. 55–62).

Petitioner contended before the hearing examiner that the shortages were the result of shrinkage (P.A. 84). Several cattle feeders and buyers, testifying on behalf of the petitioner, stated that the shortage in weight could be attributed to shrinkage (P.A. 92, 94, 96). Several witnesses for the Department of Agriculture testified to the contrary (P.A. 48–50, 107, 110). For example, Dr. Jewell Schlapp, a veterinarian, testified that in his opinion, where twenty steers in the 700

and 800-pound class were hauled a short distance, as in the present case, it was improbable that they would lose as much as 520 pounds (P.A. 114). Over petitioner's objection the hearing examiner admitted into evidence certain testimony relating to livestock hauling tests which showed that such weight loss would not occur through shrinkage (P.A. 73–75).

The hearing examiner found that the weights recorded by petitioner were false and incorrect, and that the recording of said weights and the collection of commissions for the cattle sold constituted unfair and deceptive practices in wilful violation of sections 312(a), 401, and 402 (P.A. 157–158) of the Act. The Judicial Officer of the Department of Agriculture reviewed the evidence and affirmed the foregoing findings of violation.[2] He suspended for 90 days petitioner's registration as a market agency and a dealer, ordered him to cease and desist from the violations found, and directed him to keep records correctly showing the weighing of livestock (P.A. 174–175).

The court of appeals unanimously affirmed. It held (Pet. App. 3) that "on the record as a whole substantial evidence supports the findings and that such findings are sufficient to support the order * * *."

ARGUMENT

Petitioner contends (1) that there was not substantial evidence to support the findings that he falsely

[2] The Judicial Officer disapproved the examiner's finding that petitioner had also engaged in false weighing in connection with a sale of cattle on September 28, 1960 (P.A. 173).

weighed the cattle (Pet. 17–30), and (2) that the trial examiner erroneously admitted evidence of certain tests relating to loss of weight through shrinkage incurred by cattle during transportation (Pet. 31–38). These contentions are without merit, and neither presents a question warranting further review.

1. Petitioner presents a detailed summary of the evidence supporting his claim that the loss in weight of the cattle was due to shrinkage (Pet. 11–14, 29–30). As the court of appeals recognized (Pet. App. 3), however, "[t]here was considerable testimony by cattle feeders and buyers pro and con as to whether it could be attributed to shrinkage." The evidence that the loss in weight was not due to shrinkage—and hence that it reflected false weighing by petitioner—included: testimony by Dr. Schlapp on the subject of shrinkage (P.A. 112–116); research publications dealing with the intransit shrinkage of cattle (P.A. 146–147, 167 fn. 1); testimony by persons who purchased the cattle from petitioner (P.A. 29–32, 39–40), by employees of the Department of Agriculture (P.A. 17, 19, 25, 48–50), and by cattle feeders and buyers (P.A. 32, 39, 118–119); and data gathered from tests conducted by Department of Agriculture officials (P.A. 101–105, 141–143). The evaluation of the conflicting evidence was for the Judicial Officer, and there was plainly substantial support in the record

[3] Although petitioner states (Pet. 17) that the court of appeals applied the rule that it would affirm if there was "any" evidence in the record to support the findings, the court expressly held (Pet. App. 3) that "on the record as a whole substantial evidence supports the findings * * *."

for his conclusion that the shortage in weight was due to petitioner's false weighing rather than to shrinkage. In any event, there is no occasion for further review of this factual issue.

2. Petitioner's argument that the testimony relating to the tests should not have been admitted because the tests were not made under the same conditions as those in the present case is irrelevant. For the court of appeals held (Pet. App. 3) that "apart from this testimony there is ample evidence to support the Judicial Officer's findings and conclusions." Furthermore, the significance of the distinctions between the circumstances surrounding the tests and those in the present case necessarily turns on the particular facts of this case, and goes to the weight rather than to the admissibility of the evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Acting Assistant Attorney General.

SHERMAN L. COHN,
LAWRENCE R. SCHNEIDER,
Attorneys.

FEBRUARY 1963.

U.S. GOVERNMENT PRINTING OFFICE 1963